

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLARENCE M. ALTON, II
Claimant

VS.

CITY OF WICHITA
Self-Insured Respondent

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Docket No. 1,007,283

ORDER

Claimant requests review of a preliminary hearing Order entered by Administrative Law Judge John D. Clark on December 19, 2002.

ISSUES

The Administrative Law Judge (ALJ) found the claimant had provided respondent notice of an incident where he alleged a work-related back injury while assisting another officer take a female into custody. However, the ALJ concluded the contemporaneous medical records indicated that any problems claimant suffered in that incident had resolved and claimant's current complaints of back pain were caused by a non-occupational incident while lifting a tree in late July 2002. Accordingly, the ALJ concluded claimant had suffered an intervening injury and, therefore denied all benefits.

Claimant argues he established by the preponderance of the evidence that he suffered accidental injury arising out of and in the course of his employment and the ALJ erred in denying benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant alleges he injured his back on June 19, 2002, while assisting another officer take a female into custody. While claimant was holding one arm of the female she dropped to the ground which pulled claimant over and he experienced a pulling sensation in his lower back.

Claimant was not scheduled to work the following two days and then did not return to work on his next regularly scheduled workday because of back pain. Although claimant alleged his supervisor was aware of his back problem suffered on June 19, 2002, he admitted he never requested medical treatment. Instead, claimant called his personal physician and received some muscle relaxant prescription medication. After a few days claimant returned to his regular job duties and worked until approximately the end of July. Claimant did not seek any medical treatment for his back as he continued working.

On Sunday, July 28, 2002, claimant had gone to Home Depot and purchased an evergreen tree to plant at his home. While lifting the tree to load into his car, the claimant experienced an immediate onset of lower back pain. On Monday, July 29, 2002, claimant called respondent and took sick leave.

On August 1, 2002, claimant sought treatment from Dr. Thomas J. Peters. The claimant gave Dr. Peters the following pertinent history:

Onset a couple of days with low back pain. It is painful. It was painful a month ago. A lady fell on him at work. He is a police officer, and he was wrestling with her, and she fell on him; and he hurt his back. He was okay in four or five days, and then this last weekend he was lifting a tree that he had bought and was going to plant, and he was trying to get it into the trunk of his car; and as he lifted he felt something pull in his lower back, and it has been bothering him ever since.

On August 13, 2002, claimant filled out an incident report indicating he had injured himself during the work-related incident on June 19, 2002.

An ALJ's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant suffered a subsequent intervening injury gives rise to an issue of whether claimant's current condition arose out of and in the course of his employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the

¹ K.S.A. 44-551(b)(2)(A).

² K.S.A. 44-534a(a)(2).

primary injury.³ It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.⁴

Dr. Peters' contemporaneous medical records do not support claimant's position that his current back problems are related to the incident that occurred on June 19, 2002. Instead, the records indicate claimant had recovered from that incident. The fact claimant returned to his regular job duties and neither sought nor requested medical treatment corroborates the history given Dr. Peters that after a few days claimant had recovered from the June 19, 2002, incident at work.

On July 28, 2002, claimant suffered a non-work-related accident lifting the tree. Claimant experienced the immediate onset of back pain which required medical treatment with Dr. Peters as well as a two week absence from work. The Board agrees with the ALJ's determination that claimant suffered an intervening accident which is the cause of his current need for medical treatment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated December 19, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2003.

BOARD MEMBER

c: Thomas T. Inkelaar, Attorney for Claimant
Edward D. Heath Jr., Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation

³ *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

⁴ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973). See also *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).